T-West Sales & Service, Inc. d/b/a Desert Toyota, *and* International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO (formerly 28–CA–18726 Local Lodge 744). Cases 28–CA–18478, 28–CA–18496, 28–CA–18503, and 28–CA–18699

December 23, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 3, 2003, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The Respondent operates a new and used car dealership and service facility in Las Vegas, Nevada. In pertinent part, the issues in this case concern the Respondent's alleged reactions to the administrative law judge's November 13, 2002 decision in *Desert Toyota I*, 28–CA–17904, etc. In that case, the judge recommended that a *Gissel* bargaining order issue.[2] The complaint here alleged, among other things, that the Respondent refused to provide information to the Union, refused to bargain with the Union as required by the judge's decision in *Desert Toyota I*, made several unilateral changes in its employees' terms and conditions of employment, and discriminated against two union adherents, one of whom testified against the Respondent in *Desert Toyota I*, and another of whom assumed the role of the Union's contact employee after the Respondent allegedly discriminatorily discharged the employee who previously held that position.

The judge here found that the Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act. As explained below, and pursuant to our decision in *Desert Toyota I*, 346 NLRB 118 (2005), issued contemporaneously herewith, we reverse most of the judge's findings of violations.

II. UNFAIR LABOR PRACTICES

A. Refusal to Bargain or to Provide Information

After the judge's decision issued in *Desert Toyota I*, the Union made repeated requests that the parties begin bargaining and that the Respondent provide certain information concerning unit employees. The Respondent declined to initiate negotiations, informing the Union that, because it was filing exceptions to the judge's decision, bargaining with the Union would be inappropriate. The Respondent did not respond to the Union's various requests for information.

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the requested information and by refusing to bargain with the Union. The judge found that the Respondent's bargaining obligation began in February 2002, the date on which the judge in *Desert Toyota I* determined that a majority of the employees had designated the Union as their collective-bargaining representative.

We disagree. In light of our reversal of the recommended remedial bargaining order in *Desert Toyota I*, we find that the Respondent did not have an obligation to bargain with the Union as the exclusive collective-bargaining representative of its employees. Therefore, it did not violate the Act by refusing to bargain with or to provide information to the Union. We dismiss these allegations.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of: (a) the allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing terms and conditions of employment relating to employees' mopping their work areas, to the assignment of extended warranty work, and to employee use of the timeclock; (b) the allegation that the Respondent violated Sec. 8(a)(4), (3), and (1) by disciplining Thomas Pranske on January 24, 2003; (c) the allegations that the Respondent violated Sec. 8(a)(3) and (1) by disciplining Charles Frankhouse on December 5, 2002, January 28 and April 24, 2003, threatening and discharging Frankhouse on February 25, 2003, imposing restrictions upon Frankhouse on April 17, 2003, and terminating Frankhouse's employment on or about May 8, 2003; and (d) the allegations that the Respondent violated Sec. 8(a)(3) and (1) by "diminishing work opportunities for union supporters" and by "reduc[ing] the flag or flat rate hours earned by employees who had signed cards with the Union."

Furthermore, for the reasons stated in his decision, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) when Service Director Vincent Casucci warned Frankhouse about discussing the Union and threatened that Frankhouse would be segregated from other employees.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3] For the same reason, we dismiss the allegations concerning the Respondent's allegedly unlawful unilateral changes to its employees' terms and conditions of employment. In so finding, we do not pass on the judge's findings that the various changes were material, substantial, and significant.

B. Discipline of Thomas Pranske

1. January 29, 2003

Thomas Pranske was a used-car technician employed by the Respondent. He signed a union authorization card on February 11, 2002. During the hearing in *Desert Toyota I*, the General Counsel called Pranske to testify. Pranske's testimony served as the factual basis for the administrative law judge's findings of various unfair labor practices in that case. The judge's decision in that case issued on November 13, 2002.

In January 2003,[4] Pranske was approached by New-Car Manager Steve Velasquez, Used-Car Assistant Manager Francisco Novoa, and Used-Car Buyer/Acting-Used-Car Manager Mike Candeleria. Velasquez told Pranske that they wanted a safety inspection on a 1992 Saturn that had already been sold through the Respondent's used-car department.[5] Velasquez asked how much a safety inspection would cost; Pranske replied that it would cost around $100 for a 1-1/2-hour full inspection plus a half-hour smog inspection. Although the judge did not note it, Pranske testified that Velasquez explained that the car was sold "as is," and told Pranske that "he didn't care of [sic] any of the problems that it had. All he wanted was the safety items . . . so it could be sold." Pranske inspected only the safety items.[6] On the service order, he checked only the seven safety items and left the condition of the remaining items blank.[7] However, he recorded his time on the service order as the 1-1/2-hour full inspection plus half-hour smog inspection.

Four days later, the car was towed back to the Respondent's facility because it was not drivable. The irate customer complained to Service Director Vincent Casucci about the car's condition. The car was brought into the shop, where technician Charles Frankhouse performed a full inspection. Frankhouse's inspection uncovered failure in the water pumps "and a list of other fluid type leaks." Casucci approached Candeleria and asked the used car department to "authorize the money" for the cost of fixing the car. Candeleria refused, taking the position that, because the service department had performed the inspection without notifying the used-car department that there were problems with the car, it was the service department's responsibility to fix the car. After reviewing Pranske's service order and learning that Pranske failed to make any notations regarding the faulty condition of the car, Casucci agreed with Candeleria that the service department was responsible for the cost of repairs. Thus, Casucci had the service department fix the car at its own expense.

On January 29, Casucci issued a corrective action record (CAR) to Pranske, citing Pranske's failure to note the car's faulty condition on the service order he prepared when he inspected the car.[8] Pranske objected to the disciplinary warning, arguing that he had done exactly what Velasquez told him to do, and that he had performed similar abbreviated safety-item inspections before without issue. Casucci was not satisfied with this explanation and told Pranske there was not enough information on the service order. Pranske asked Candeleria and Novoa to confirm his account of his discussion with Velasquez, which they did. According to Pranske, Casucci replied, "[T]hat he couldn't believe them of what they were saying." Casucci testified that, despite corroboration, Pranske's explanation that he was only doing as he was told was "not a good answer."

Although not mentioned by the judge in his decision, at the hearing in this case, Pranske acknowledged in testimony his dual obligations as a member of the used-car reconditioning team. He testified:

> That's the problem with the recondition department. They work for both [the service department and the used-car department]. And it's one of those where you have Vinnie [Casucci] as your boss, and you have the guys [from used-car] as your boss, and they—it's just a tough job.
>
> You know, because [used car] is in charge of what they want done to their cars, you know, and they're telling you what they want to do, but you're also with the service department, and what they're wanting done. So you—and if you don't say, you know, if you don't go along with Mr. Velasquez, what he just told you, then you're going to get in trouble with Vinnie, because he's going to Vinnie, and why didn't he do what I said? So—and so you're just kind of caught in the middle.

The judge found that the Respondent violated Section 8(a)(3), (4), and (1) by disciplining Pranske. We disagree. Our analysis of whether the discipline violated the

[4] All dates hereafter are in 2003, unless otherwise noted.

[5] However, the sale was contingent upon a safety inspection.

[6] Safety items are windshield wipers, brakes, tires, lights, windshield, seatbelts, and horn.

[7] According to Pranske, the Respondent requires its used-car technicians to inspect 168 different items when performing a full inspection.

[8] The CAR cited "Dependability" as the reason for action, and identified the event as follows: "Tom performed a vehicle safety inspection—Tom listed no notes of the vehicles [sic] condition—or any concerns about the vehicle—the vehicle was sold—the vehicle was towed back in 4 days after inspection—found water pump failure and several oil leaks (Heavey) [sic]—Tom did not note anything about the vehicle having heavy oil leaks—or any other condition—so the vehicle was sold without knowing this information." Under "Required Improvement," Casucci wrote "Tom must completely inspect vehicles per recon/inspection guidelines and note what has been found. . . ."

Act is governed by the test articulated in *Wright Line*.[9] Under that test, the General Counsel must prove that animus against protected activity was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.[10] See *Willamette Industries*, 341 NLRB 560, 562 (2004).

If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). The ultimate burden remains, however, with the General Counsel. *Framan Mechanical Inc.*, 343 NLRB 408, 411 (2004) (citing *Wright Line*, 251 NLRB at 1088 fn. 11).

Here, the judge found that the General Counsel met his burden to prove that animus against Pranske's union activity and against his Board hearing testimony was a substantial or motivating factor in the January 29 discipline. The judge further found that the Respondent failed to meet its burden to prove that it would have disciplined Pranske absent his union activity. According to the judge, the Respondent did not satisfactorily explain Casucci's rejection of Pranske's corroborated excuse that he was simply following Velasquez' orders. In this regard, the judge "d[id] not credit Casucci that he was merely disciplining Pranske for faulty work performance relating to the used car inspection." While we question whether the General Counsel has satisfied his initial burden under *Wright Line*, we will assume, for purposes of deciding this case, that he did. However, contrary to the judge, we find that the Respondent established that it would have disciplined Pranske even in the absence of his protected activity.

The Respondent disciplined Pranske for failing to conduct a proper inspection and to identify the car's defects, as the testimony of Pranske and Casucci and the text of the CAR make clear. Pranske acknowledged that the inspection was incomplete and that it fell short of the Respondent's guidelines. From the Respondent's perspective, Pranske's inadequate inspection had serious consequences. It resulted in the sale of a defective car, which damaged the Respondent's business reputation. Further, the Respondent considered Pranske's failure to fully inspect the car sufficiently egregious that the service department was forced to absorb the cost of repairing it.

The discipline was also consistent with discipline for like infractions in the past. Employee Richard Drugmand was disciplined by the Respondent for "not writing [on a service order] what [he] found on the vehicle." Of even greater significance is the fact that Pranske himself received a written warning on January 24 for failing to "completely inspect vehicles per recon[ditioning] guidelines" by allowing a car to leave the shop with undersized and warped brake rotors.[11] Thus, the warning given to Pranske on January 29 was entirely consistent with a warning given him for a similar violation only a few days earlier.[12]

Our dissenting colleague argues that the Respondent's defense fails because Pranske was following Velasquez' instructions when he performed the abbreviated inspection. We disagree. Casucci had no knowledge of Velasquez' limiting instruction at the time he issued the CAR.[13] When Pranske brought the instruction to Casucci's attention, he nevertheless concluded that the discipline was justified. For the reasons that follow, we find that the Respondent's discipline of Pranske was nondiscriminatory.

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[10] Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation.

[11] There are no exceptions to the judge's finding that this discipline was lawfully issued.

[12] Our dissenting colleague asserts that these comparable instances of discipline are unavailing because "[t]here is no evidence that in any of these instances the employees disciplined were following precise instructions from supervisory personnel." This argument fails. At the time he made the decision to discipline Pranske, Casucci had no notice that Pranske was following Velasquez' instructions. Casucci knew only that, despite Pranske's apparently complete inspection, Pranske failed to identify faulty conditions which caused the car to be returned for repairs at the service department's expense. In our view, these prior instances of discipline for failure to completely inspect a car or find any defects are comparable to the decision to discipline Pranske here.

[13] We therefore respectfully disagree with the dissent's assertion that the judge found that Casucci knew of the instruction "at the time he formally warned Pranske."

First, Pranske admitted that he was required to satisfy his own service department's standards as well as those of Velasquez' used-car department when performing used-car inspections. Thus, although Velasquez may have told Pranske to do a safety inspection, Pranske understood that the service department would want a full inspection. Indeed, Pranske's service order recorded the 1-1/2 hours necessary for the full inspection. Clearly, Pranske did not do that full inspection.[14]

Second, the Respondent had recently evidenced a willingness to hear Pranske's explanation of service-related deficiencies before finalizing a prior disciplinary decision. As previously mentioned, Casucci issued a CAR to Pranske on January 24 for allowing a car to leave the shop with faulty brake rotors and for failing to diagnose a noisy drive shaft spline binding. After Casucci issued the CAR, he and Pranske measured, at Pranske's request, one of the two brake rotors and found it to be within specifications. Pranske also had technician Ted Gardner tell Casucci that he worked on the car after Pranske and did not recall hearing any noise relating to the drive shaft. After receiving this additional information, Casucci modified the CAR to state that only one of the brake rotors failed to meet specifications. As mentioned above, there are no exceptions to the judge's finding that this discipline was lawful. The Respondent gave the same consideration to Pranske's "following orders" defense on January 29, but rejected it.

Third, testimony that Pranske performed inadequate inspections in the past, and was not disciplined, does not alter this analysis. There is no evidence that any of these prior inadequate inspections came to the attention of the service department, much less resulted in a car being sold in a seriously defective condition requiring the service department to absorb its repair costs. An employee is not insulated from discipline simply because his previous failures to work to a specification did not come to management's attention. Further, in each instance where the Respondent *was aware* of Pranske's failure to conduct a proper service inspection, it acted promptly to investigate the matter and to impose discipline.[15]

We disagree with our dissenting colleague to the extent she argues that the judge's finding of an unfair labor practice for disciplining Pranske can only be reversed if we overturn the judge's credibility finding regarding Casucci's testimony as to his motivation for the discipline. While we have some question with regard to the judge's credibility determination,[16] the Board has appropriately held that the ultimate issue in a case of this nature—the Respondent's motivation for disciplining Pranske—is to be resolved based on all record evidence taken as a whole.[17]

As noted supra, Pranske had received a disciplinary warning on January 24 for failing to "completely inspect vehicles per recon[ditioning] guidelines." There is no longer any contention that this discipline was unlawful. Only 5 days later, Pranske repeated the offense. Concededly, service manager Velasquez had told Pranske to perform only a safety inspection. However, Pranske worked for the used-car department and the service department. Indeed, in his testimony herein, Pranske acknowledged his dual obligations. In the latter capacity, Pranske had an obligation to perform a full inspection. He even recorded his time as performing both. Accordingly, Casucci rejected as insufficient Pranske's explanation that Velasquez told him to do only a safety inspection. In sum, Pranske had committed two similar offenses within a short timeframe. Clearly, a warning under these circumstances was not discriminatory. Consequently, we find that, even apart from Casucci's discredited testimony on his motivation, the Respondent nevertheless showed by a preponderance of the evidence that it would have disciplined Pranske on January 29 in the absence of his protected activity, just as it did on January 24. We therefore reverse the judge and dismiss the allegations that the discipline violated Section 8(a)(3), (4), and (1).

[14] In this regard, Member Schaumber notes that the Respondent discharged Velasquez 2 days after Casucci learned about this incident.

[15] We note that the Respondent eventually fired Pranske in May 2004 for falsely stating in reports filed with the Nevada Department of Motor Vehicles that he conducted a complete safety inspection of a vehicle. This discharge was the subject of an unfair labor practice allegation in *Desert Toyota*, Case 28–CA–19447 *(Desert Toyota III)*, now pending before the Board on other issues. There are no exceptions to the judge's finding that the discharge was lawful. See *Desert Toyota III*, 346 NLRB 99 (2005)

[16] Among other things, there is no indication that the judge considered Casucci's undisputed testimony that the used-car department refused to cover the cost of repairs because of Pranske's incomplete service order, or Pranske's admission that he was subject to discipline if he failed to meet the standards of either the used car department or the service department

[17] In *Charles Batchelder Co.*, 250 NLRB 89, 89–90 (1980), enf. denied 646 F.2d 33 (2d Cir. 1981), the Board explained:

> The Administrative Law Judge credited Respondent's explanation for the discharge of Fleming and, on the basis of such credibility finding, concluded that Fleming was properly discharged solely for making "a threat of bodily harm . . . to an employee who had expressed his preference to refrain from union activity." However, the question of motivation where an alleged unlawful discharge [or other adverse action] is involved is not one to be answered by crediting or discrediting a Respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved by a determination based on consideration and weighing of all the relevant evidence.

Accord: *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 fn. 6 (2004).

2. January 31, 2003

After receiving the writeup on January 29, Pranske became upset and started arguing with Casucci. Pranske testified that he told Casucci that the warning was "a bunch of 'b.s.,' that Casucci should quit 'screwing' with him, and that he was getting the warnings because of 'union bullshit.'" Pranske also testified that he used "some other words" during this encounter. Casucci testified that Pranske said, "just fuckin' fire me," and "what are you fuckin' doing," while directing hostility at and scaring Casucci. Casucci told Pranske that that type of behavior was not going to be tolerated. Pranske left the office and slammed the door.

On January 31, the Respondent issued to Pranske another disciplinary writeup for his "insubordinate" behavior in response to receiving the warning concerning the safety inspection. The writeup notes Pranske's protesting the earlier warning by stating, "this isn't fucking right." The judge found that this written warning was a continuation of the discriminatory action taken against Pranske when the Respondent issued the January 29 warning. Thus, according to the judge, this, too, was a violation of Section 8(a)(3), (4), and (1).

We disagree. In light of our finding that the Respondent's issuance of the January 29 discipline was not discriminatorily motivated, we find that the judge's "continuation" analysis is incorrect. Moreover, and even assuming the General Counsel met its initial burden in proving that Pranske's protected activities were a motivating factor in the January 31 discipline, we find that the Respondent has offered sufficient evidence to demonstrate that it would have disciplined Pranske even in the absence of his union activity. The record shows that other, similarly situated employees were disciplined for insubordinate behavior and abusive language. Indeed, Charles Frankhouse was temporarily discharged following an argument with Aaron Morey, the reconditioning dispatcher, during which he yelled, "[I]f you can't take a fuckin' joke then don't fuckin' tease me."[18] The judge found this discharge to have been lawfully issued. Here, Pranske used more inflammatory language than Frankhouse, and only received a written warning.

In these circumstances, we find that the Respondent has shown that its discipline of Pranske on January 31 was consistent with its treatment of other, similarly situated employees. We therefore conclude that the Respondent showed that it would have disciplined Pranske for his outburst, even in the absence of his union activities. Accordingly, we reverse the judge's finding that the discipline violated Section 8(a)(3), (4), and (1), and we dismiss these allegations.

[18] Frankhouse also received written warnings for insubordinate behavior on April 8 and May 9. None of this discipline was found to have been issued unlawfully.

ORDER

The National Labor Relations Board orders that the Respondent, T-West Sales & Service, Inc. d/b/a Desert Toyota, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees about discussing union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

Prounion employee Thomas Pranske, whose testimony in a companion case was the basis for finding that the Respondent had violated the Act, was disciplined for following a superior's instructions. Not surprisingly, he complained hotly to a supervisor, insisting that the warning was really because of his union activity—and was disciplined again, this time for insubordination. Discred-

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

iting the Respondent's chief witness, based in part on demeanor, the judge was not persuaded that the Respondent would have disciplined Pranske regardless of his union activity. Neither am I, contrary to the majority, which errs in this and other respects.[1]

I.

Pranske was given a corrective action record (CAR) on January 29, 2003,[2] by Service Department Director Vincent Casucci, purportedly because he performed an incomplete inspection on a used vehicle that was sold with leaks and then returned by the customer. Casucci decided that the service department should absorb the cost of repairing the car and prepared a CAR without first speaking with Pranske about the incident.[3]

When Casucci presented Pranske with the discipline, Pranske explained that he performed only a "bare bones" safety inspection of the vehicle because General Sales Manager Steve Velasquez, along with Assistant Used-Car Manager Francisco Novoa and Company Car Buyer Mike Candeleria, had expressly instructed him to do so.[4] Novoa and Candeleria confirmed that Pranske had performed the inspection precisely as directed by Velasquez. Casucci nevertheless told Pranske that his explanation "was not a good answer."

Pranske became upset by what he perceived as an unjustified discipline, and told Casucci that the warning was "b.s.," that Casucci should quit "screwing" with him, and that the warning was really because of "union bullshit." Casucci disciplined Pranske for this behavior on January 31.

II.

The judge correctly found that the General Counsel met his initial burden of establishing that union or other protected activity was a motivating factor in the disciplining of Pranske.[5] It is clear that the Respondent knew of Pranske's protected activity: Pranske testified adversely to the Respondent in an earlier case, *Desert Toyota I*, supra, and his signed authorization card was part of the record there. The Respondent's union animus is also clear from its numerous violations of the Act found earlier, including coercively interrogating Pranske about his and a coworker's union activities and telling him in no uncertain terms that the coworker was fired for his union activism. The burden of proof thus shifted to the Respondent to establish that it would have taken the same action even absent Pranske's protected activity. The Respondent has not done so.

As the judge did, I would find that the Respondent failed to provide a credible reason for its adverse action against Pranske. The judge, citing "demeanor and the record as a whole," discredited Casucci's explanation for the original writeup: that Pranske had failed to correctly inspect and document the inspection of a used car that was subsequently returned. The judge also relied on the Respondent's failure to address the undisputed evidence that Pranske's inspection of the vehicle complied with the specific instruction of superiors and that Casucci knew this at the time he formally warned Pranske. I see no basis for reversing the judge's credibility determination, applying the Board's high standard.[6] There is no evidence that Pranske acted inappropriately in following Velasquez' instructions. His undisputed testimony is that he had done so on many occasions. Indeed, Pranske's uncontradicted testimony was that he could get into trouble with Casucci for failing to follow Velasquez' orders.[7] Disciplining an employee for taking action directed by

[1] Because I agree with the judge that a *Gissel* bargaining order against the Respondent was warranted in *Desert Toyota I*, 346 NLRB 118 (2005), for the reasons stated in my dissenting footnote in that case, I would find that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union and to provide the Union with information concerning unit employees and by unilaterally implementing new work rules.

I agree with the majority and the judge that the Respondent unlawfully threatened employee Charles Frankhouse for discussing the Union.

[2] All dates hereafter are in 2003.

[3] The CAR identified the basis for the discipline as follows: "Tom [Pranske] performed a vehicle inspection—Tom listed no notes of the vehicles [sic] condition—or any concerns about the vehicle—the vehicle was sold—the vehicle was towed back in 4 days after inspection—found water pump failure and several oil leaks (Heavey) [sic]—Tom did not note anything about the vehicle having heavy oil leaks—or any other condition—so the vehicle was sold without knowing this information."

[4] A "bare bones" safety inspection includes checking the windshield wipers, brakes, tires, lights, windshield, seatbelts and horn. It does not include checking the vehicle's water pump or fluid systems.

[5] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 262 (3d Cir. 1951) (Board's established policy is not to overrule administrative law judge's credibility resolutions unless contrary to clear preponderance of all relevant evidence). Contrary to the majority's view, the judge's credibility determination here was supported (as he stated) by the record as a whole. This is not a case, then, where a finding of pretext rests on the bare discrediting of an employer witness's testimony as to the reasons for discipline. See *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1056 and fn. 11 (2000), enfd. 282 F.3d 972 (7th Cir. 2002) (affirming finding of pretext based on credibility determination).

[7] Casucci testified that Velasquez did not have any authority to direct Pranske's work and that Pranske's job was to perform a complete inspection when he received a work order. However, Pranske's testimony that he had performed abbreviated inspections at Velasquez' request on several other occasions is uncontradicted.

his superiors is strongly suggestive of an unlawful motive.

The majority nevertheless concludes that "the Respondent established that it would have disciplined Pranske even in the absence of his union activity." It cites the "serious consequences" of Pranske's inspection: harm to the Respondent's business reputation and forcing the service department to absorb the cost of repairing the car. It also asserts that the "discipline was consistent with that imposed for like infractions in the past." The majority explains its reversal of the judge in part by observing that "there is no indication that the judge considered Casucci's undisputed testimony that the used-car department refused to cover the cost of repairs because of Pranske's incomplete service order."

But the majority's explanation is untenable. It depends on an artificial distinction between Pranske's work performance and the claimed consequence of that performance: that the service department absorbed the cost of the repairs (Casucci's decision). Casucci did not state that the repair cost, as something separate from Pranske's work performance, was the reason for disciplining Pranske; the Respondent did not argue the repair-cost point until its brief to the board. Thus, when the judge, in his words, did "not credit Casucci that he was merely disciplining Pranske for faulty work performance," he necessarily disposed of the repair cost as an explanation for Pranske's discipline.

The majority's reliance on discipline involving several other employees is also unavailing. There is no evidence that in any of these instances the employees disciplined were following precise instructions from supervisory personnel. For that reason, these instances of discipline are not comparable to the situation here.

The majority concedes that it is significant that Pranske complied with instructions from Velasquez, but asserts that this fact is insufficient to demonstrate that the Respondent's explanation for the discipline is pretextual. Of course, it is the *Respondent's* burden (as the majority acknowledges) to show that it actually would have disciplined for a lawful reason regardless of his protected activity. And the majority admits that it is *not* enough for the Respondent merely to present a justifiable reason for its action.[8] That, at most, is all the Respondent has done here. Given the judge's discrediting of Casucci, the Respondent has not met its burden.

Finally, I agree, for the reasons stated by the judge, that the second discipline received by Pranske, arising from his angry response to the first unlawful discipline, was a continuation of the discriminatory action taken against him, and was also unlawful.

[8] See, e.g., *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. mem. 99 F.3d 1139 (6th Cir. 1996) (cited by the majority).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees about discussing union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

T-WEST SALES & SERVICE, INC. D/B/A/ DESERT TOYOTA

Joel C. Schochet, Esq., for the General Counsel.
James M. Walters, Esq., for the Respondent.
Dennis London, for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act).[2] On the entire record, including my observation of

[1] This matter was heard at Las Vegas, Nevada on July 1–2 and 17, 2003. By letter dated November 4, 2003, the Regional office notified the undersigned that the Board had authorized the Region to seek 10(j) injunctive relief in cases that included cases considered in this decision.

[2] 29 U.S.C. §§157, 158(a)(1), (3), (4), and (5):

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . .

the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a car dealership at its facility in Las Vegas, Nevada. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

On November 13, 2002, Administrative Law Judge Lana H. Parke issued her decision in JD(SF)–92–02 involving the same parties as this case. She found that since the latter part of February 2002 the Union had been designated by a majority of the Respondent's employees as their collective-bargaining representative in the following appropriate unit:

> All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

Judge Parke recommended that the Board issue a bargaining order directing the Respondent to bargain with the Union as the representative of the unit employees. She also found that the Respondent had committed various unfair labor practices, including that the Respondent discharged Jorge Galindo because of his activity on behalf of the Union. That finding was based in part upon the testimony of its employee Thomas Pranske especially regarding the actions of Respondent's agents, acting service director, Vinnie Casucci, and used-car manager, Tony Zita.

The Government in the present matter alleges that the Respondent has violated Section 8(a)(5) of the Act by refusing to bargain with the Union and provide it with certain relevant information, as well as making several unilateral changes to terms and conditions of employment without giving the Union notice and an opportunity to bargain. It is further alleged that the Respondent violated Section 8(a)(3) of the Act by discriminating against employees because of their support for the Union. In the case of employee Thomas Pranske, it is alleged the Respondent violated Section 8(a)(4) of the Act by retaliating against him for having given testimony at the prior trial. Finally, the Government alleges that the Respondent threatened an employee and promulgated an unlawful no-solicitation rule to keep employees from talking about the Union in violation of Section 8(a)(1) of the Act.

The Respondent has filed exceptions to Judge Parke's decision and order. Due to the appeal of that decision, the Respondent concedes it has declined to bargain with the Union. The Respondent asserts that it has neither instituted new work rules nor retaliated against any employees, whether known to support the union or not. The Respondent asserts it has, in some cases, reminded employees of rules that were in place prior to the time any union organizing efforts began. Finally, the Respondent argues that none of the rules in question was onerous or substantial and any changes were de minimis.

III. THE 8(A)(5) ALLEGATIONS

A. The Respondent's Refusal to Bargain and Provide Information

On December 10, 2002, Mike Wardle, the Union's grand lodge representative, wrote two letters addressed to the Respondent's general manager, Bob Carmendy. Wardle's letters requested that the parties begin bargaining and asked that the Respondent provide certain information concerning unit employees, including names, pay, hours worked, benefits, job titles, etc.

On December 18, 2002, Jorge Gonzalez, director of labor relations for the Respondent's parent, AutoNation, replied to Wardle's letters by stating that the Respondent would be filing exceptions to Judge Parke's decision and it was, therefore, inappropriate to bargain with the Union.

On March 11, 2003, Wardle wrote another letter to the Respondent requesting the names, addresses and telephone numbers of service technicians that the Respondent had newly hired. The Respondent did not respond to Wardle's request.

On March 24, 2003, Wardle wrote the Respondent stating the Union had learned that the Respondent was making unilateral changes to the pay periods of unit employees. Wardle requested that the Respondent bargain about the unilateral changes. On March 26, Gonzalez wrote Wardle noting that the Respondent had appealed Judge Parke's decision and, thus, was under no obligation to bargain with the Union.

On March 27, 2003, Wardle sent the Respondent another request for the names, addresses and telephone numbers of recently hired unit employees. The Respondent did not reply to his request.

It is axiomatic that an employer acts at its peril in refusing to bargain with a union while the union's status is being contested. *L. Suzio Concrete Co.*, 325 NLRB 392, 396 (1998), enfd. 173 F.3d 844 (2d Cir. 1999); *Clements Wire & Mfg. Co.*, 257 NLRB 1058, 1058 (1981). To hold otherwise would punish employees while benefiting the violator of the Act. As the Board stated in *Maywood Donut Co.*, 256 NLRB 507, 508 (1981):

> With respect to Respondent's request to . . . stay these proceedings pending a determination in [the earlier unfair labor practice case] by the United States Court of Appeals for the Ninth Circuit, the request is denied. It is settled law that the pendency of collateral litigation does not suspend a respondent's duty to bargain under Section 8(a)(5) of the Act. [Citations omitted.]

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ,

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) to refuse to bargain collectively with the representatives of his employees . . . .

An employer's obligation to bargain in good faith includes providing a union with necessary information that is relevant to the performance of its obligations as the employees' bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Board and the courts apply a liberal, discovery-type standard of "probable or potential relevance" in determining whether a bargaining representative is entitled to requested information for these purposes. *Acme Industrial Co.,* supra.

The Respondent has been obligated to bargain with the Union since February 2002 the date that Judge Parke determined that a majority of the employees had designated the Union as their collective-bargaining representative. Based on this majority status she held that a *Gissel* bargaining order was part of an appropriate remedy for the Respondent's unfair labor practices. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614–615 (1969) ("If the Board finds that the possibility of erasing the effects of past unfair labor practices and ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."). The Respondent has not challenged the necessity or relevance of the information that the Union requested and I find that the information clearly deals with the employees' wages, hours, and working conditions and is relevant and necessary to the Union's representative duties. *Watkins Contracting, Inc.*, 335 NLRB 222 (2001); *Children's Hospital*, 312 NLRB 920, 930 (1993), enfd. 87 F.3d 304 (9th Cir. 1996); *Crown Coach Corp.*, 243 NLRB 984, 985 (1979). I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide the requested information to the Union and by refusing to bargain with the Union.

B. Unilateral Changes

The Government alleges that several acts of the Respondent are unlawful unilateral changes that involve the unit employees' wages, hours and working conditions. The Respondent contends that most of the "changes" were nothing more than a reemphasis of existing rules, and in any case were not material, substantial and significant. It is undisputed that the Respondent did not notify or bargain with the Union about the following changes.

1. Performance improvement process

In a communication dated September 2002 the Respondent's parent company, AutoNation, informed its general managers that it had instituted "an important new program" at all of its dealerships called the AutoNation performance improvement process (PIP). The purpose of the program was "to provide guidance on how to properly improve associate performance and document corrective action conversations." The letter was signed by the parent company's chief executive officer and its president and chief operating officer. None of AutoNation's general managers participated in the PIP's development. Part of the "rollout" of the PIP directed senior managers to hold meetings with managers and supervisors no later than November 1, 2002, to explain the plan to them. All managers and supervisors were then required to complete computer-based training in the PIP by December 31, 2002.

The Respondent argues that the PIP was not a new program, but rather a reiteration of its old disciplinary system. The Government alleges that the documentation announcing the PIP clearly states it was a new program, and, importantly, the PIP added grounds for disciplining employees.

The 2000 edition of the AutoNation associate handbook (human resources policies & procedures) lists examples of 20 offenses that would subject an employee to discipline. The PIP contains a list of 35 such disciplinary offenses. Some of the new offenses added to the list included, "Poor attitude, including rudeness or lack of cooperation"; "Using company telephones for non-company purposes (except emergencies)"; "Wasting time, material, or effort, or interfering with others by action, excessive noise, or non-work related conversations" and "Citations for DUI or DWI of any associate whose duties may include operation of Company vehicles, even if infraction occurred in a personal vehicle on his/her own time."

A unilateral change in represented employees' terms and conditions of employment is a mandatory subject of bargaining and is unlawful if the change is "material, substantial and significant." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). The Board has held that an employer's creating new grounds for discipline represented ''material, substantial, and significant'' unilateral changes from the status quo of employment conditions. *Bath Iron Works*, 302 NLRB 898, 902 (1991) (Adding discipline for employee offenses involving possessing drug paraphernalia and being convicted of a drug or alcohol related crime, mandatory subjects of bargaining. The Board additionally noted that the new offenses "introduced potential sanctions that could logically apply to conduct having no manifestation at all on the Respondent's premises, e.g., a drunk driving conviction arising from an incident during vacation."); *Sygma Network Corp.*, 317 NLRB 411, 415 (1995) (Respondent's addition of policies and increasing the discipline for violating previous policies were unlawful unilateral changes.). I find that the PIP was a material, substantial and significant change in the terms and conditions of employment of unit employees and was thus a mandatory subject of bargaining. *King Soopers, Inc.*, 340 NLRB 628, 628–629 (2003) (Work rules that can be grounds for discipline are mandatory subjects of bargaining.); *Praxair, Inc.*, 317 NLRB 435, 436 (1995); *Tenneco Chemicals,* 249 NLRB 1176, 1180 (1980) (Performance standards that can be enforced by discipline have an effect on employees' job security and are therefore a mandatory subject of bargaining); *Murphy Diesel Co.*, 184 NLRB 757, 762 (1970), enfd. 454 F.2d 303 (7th Cir. 1971). I conclude, therefore, that the Respondent's unilateral implementation of the PIP with regard to unit employees is a violation of Section 8(a)(1) and (5) of the Act.

2. Discipline pursuant to the PIP

The Government alleges that because the Respondent's institution of the PIP was an unlawful unilateral change, it follows that disciplining employees pursuant to the PIP also was unlawful. In addition, it is argued that the corrective action record (CAR)—a written disciplinary form used to record corrective and disciplinary matters—was introduced as part of the new

PIP, and, therefore, the issuance of CARs should likewise be a violation of the Act. The Respondent argues that there is no evidence that the PIP/CARs resulted in discipline that the employee would not have received before the PIP program was announced to management.

The CAR is a part of the new progressive disciplinary procedure instituted by the PIP. The worker is to be given the opportunity to sign the CAR and it is then made "a permanent part of the associate's personnel record." Since the Respondent has refused to recognize and bargain with the Union, it has had no say in negotiating about either the creation or implementation of the CAR as it relates to unit employees. I find, therefore, that the Respondent's use of CARs to record discipline of employees as an integral part of its PIP program is a violation of Section 8(a)(1) and (5) of the Act.[3]

3. Passing out paychecks

On December 20, 2002, the employees received a memo informing them that the Respondent was changing the time that they would receive their paychecks to 5 p.m. This change adversely effected service technicians because their workdays ended before that time. The prior practice was to give service technicians their paychecks before 5 p.m. The change caused some technicians to have to remain after the end of their shifts in order to receive their checks. After a period of several weeks, and complaints from employees, the Respondent changed back to the prior practice of distributing paychecks before 5 p.m.

The Respondent explained that the change had been initiated to avoid department heads constantly calling in the afternoon to see if their checks were ready—a distraction that had caused problems for the payroll department. When it was called to Respondent's attention that the new practice was presenting problems for the technicians the paycheck distribution was again revised to accommodate them. Thus, the Respondent argues the change was de minimis.

The Government proved that the change in the paycheck distribution policy did have an adverse effect on some employees. While the policy was ultimately modified, I do not agree with the Respondent that the change was thereby de minimis. Rather, I find that because of the inconvenience caused unit employees for a period of weeks the unilateral change was a material, substantial and significant change. I conclude that the Respondent did violate Section 8(a)(1) and (5) of the Act by unilaterally changing the paycheck distribution time.

4. Mopping work areas

The Government's complaint alleges that in November 2002 the Respondent began requiring unit employees to mop up their service bays under threat of discipline. The Respondent defends against this allegation by arguing that the employees had always been responsible for keeping their service areas clean.

Respondent's service department director, Vincent Casucci, sent a reminder notice to employees in November 2002 reiterating the Respondent's policy to keep their work areas clean. He noted that some of the technicians were "getting a little sloppy" and testified that problem resolved itself shortly after his memo.

Employees Clayton Lamoya, Richard Drugmand, and Thomas Pranske testified that they had always been aware of the Respondent's policy that they were responsible for keeping their service bay areas cleaned up. Employee Charles Frankhouse began working for the Respondent on August 12, 2002. He testified that no one had ever told him he had to mop his area. On December 5, Frankhouse was given a warning for failing to mop up his bay.

I find that the preponderance of the evidence shows that the Respondent did not make an unlawful unilateral change by enforcing its longstanding policy of requiring employees to keep their service bays cleaned. I conclude that the Respondent did not violate Section 8(a)(1) and (5) by reiterating the policy in November 2002. I do, however, find that the CAR form given to Frankhouse for this infraction is an example of the unlawful implementation of the PIP plan and must be expunged from his personnel record.

5. Test drive route

On January 3, 2003, Casucci distributed a memo to unit employees in which he discussed certain policies. One point stated that the Respondent was establishing a required route for test driving cars. The memo informed employees that if they deviated from the prescribed route they would be subject to discharge. No evidence was presented that test routes had ever been dictated before or subject to discharge

The Respondent argues that most technicians already used the same or similar route it prescribed. The Respondent explained that it had been in the process of acquiring property adjacent to the dealership, and some area residents had complained about dealership traffic in their neighborhood. In an effort to appease the neighbors the Respondent decided to prohibit test drives in the residential area south of the dealership.

The record establishes that service employees had driven various routes when testing vehicles. There was no evidence presented that prior to the memo an employee would be subject to discipline because he drove a self-determined test route. The threat to discharge an employee for ignoring the restricted route is an important consideration in determining whether that unilateral change is material, substantial, and significant. I find that the Respondent's unilateral implementation of the mandatory test route, which carried with it a penalty of termination, was a substantial unilateral change. I conclude, therefore, that the Respondent did thereby violate Section 8(a)(1) and (5) of the Act. *King Soopers, Inc.,* 340 NLRB 628, 629 (2003).

6. Prohibiting side work

The Government alleges that the Respondent violated the Act by unilaterally establishing a policy against employees using its facilities to do private work on other person's vehicles ("side work"). Casucci's January 3, 2003 memo told employees that doing such private work was not permitted at any time. The memo's prohibition ended with the pronouncement that, "Any Service Technician caught performing side work on any vehicle will be terminated on the spot."

Employee Clayton Lamoya testified that he and a couple of other employees had done side work prior to the issuance of the memo. He testified that he ceased doing such work after receiving that document. The Respondent presented no evidence that

[3] See fn. 4 for the remedial breadth of this ruling.

it had a written rule pertaining to side work prior to Casucci's memo. Casucci, however, credibly testified that the Respondent had always had a policy against such activity because it amounted to employees using company facilities, supplies, and equipment for their personal gain. Casucci testified that the item dealing with side work was published due to his learning that some employees were engaged in such activity. I credit Casucci's testimony that his memo was restating an established policy prohibiting side work. The additional element of the side work memo, however, was the threat that employees would be fired "on the spot" for engaging in such activity. The Respondent offered no evidence that this punishment had ever been a part of its existing side work policy. I find that this punishment proclamation is a substantial, material and significant change in the Respondent's policy and is a mandatory subject of bargaining. I conclude, therefore, that the Respondent's unilateral change in dictating immediate discharge for side work did violate Section 8(a)(1) and (5) of the Act. *King Soopers*, supra.

7. Changing employees' work schedule

Casucci's January 3 memo also stated that employees' work hours would start at 7 a.m. and conclude at 4:30 p.m. Prior to this date some unit employees worked schedules that differed from these hours.

Work schedule changes are mandatory subjects of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville,* 330 NLRB 900, 902 fn. 19 (2000); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992). I find, therefore, that the Respondent's change in unit employees' work hour schedules without providing the Union notice and an opportunity to bargain about the subject was unlawful. I conclude that the Respondent thereby violated Section 8(a)(1) and (5) of the Act. *Indian River Memorial Hospital, Inc.,* 340 NLRB 467, 468–469 (2003) (Unilaterally changing shift schedules and on-call procedures found to be an 8(a)(5) violation.)

8. Assignment of extended warranty work

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act when on or about February 19, 2002, it began assigning extended warranty work to used-car technicians. The evidence shows that employee Charles Frankhouse wanted to do extended-warranty work, which gave him the opportunity to earn more money while working fewer hours. Casucci had agreed to this assignment for Frankhouse when he hired him. Around February 2002, Frankhouse observed that some other technicians were doing extended-warranty work. When he complained about the matter, Casucci explained to him that the others had gotten the work because he had not finished a job on a Dodge vehicle. Frankhouse replied that he had finished his work on the car, and Casucci said he would then tell Frankhouse's supervisor to give him the extended-warranty work. No further assignments of extended-warranty work were made to other employees thereafter through the remainder of Frankhouse's employment with the Respondent.

I find that this short assignment of work was not substantial or material enough to constitute an unlawful unilateral change under the provisions of the Act. I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act by this temporary assignment of extended-warranty work.

9. Changing employees' paydays

The Government alleges that the Respondent unlawfully changed unit employees' paydays. On March 20, the Respondent issued a memo changing its semi-monthly paydays from the 5th and the 20th of each month to the 10th and the 25th. Paydays are a mandatory subject of bargaining, and I find that by unilaterally changing the paydays the Respondent violated Section 8(a)(1) and (5) of the Act. *Abernathy Excavating*, 313 NLRB 68 fn. 1 (1993); *American Ambulance*, 255 NLRB 417, 421 (1981), enfd. 692 F.2d 762 (9th Cir. 1982).

10. Requiring employees to use the timeclock

The Government alleges that the Respondent unilaterally required employees to punch timeclocks. The Respondent contends it has always maintained a timeclock policy. Several employees testified that they had not regularly punched the timeclock when coming to and leaving work. This is contrary to the Respondent's written policy as demonstrated by a signed statement that employees are required to sign upon being hired—"all personnel punch in and out on the time clock daily." The record does not demonstrate that the Respondent had a general disregard for its timeclock policy prior to the union activity at the facility. I find that the Government has failed to prove by a preponderance of the evidence that requiring employees to use the timeclock was an unlawful unilateral change. I conclude that the Respondent did not violate Section 8(a)(1) and (5) of the Act by enforcing its existing timeclock policy.

IV. THE RESPONDENT'S ACTIONS AGAINST PRANSKE

The Government alleges that various actions that the Respondent took against employee Thomas Pranske violated the Act. The Respondent argues that it only imposed discipline against Pranske because of legitimate concerns surrounding his work.

A. Brake Rotors

On January 24, 2003, Casucci gave Pranske a CAR for disputed work Pranske had done on some brake rotors. Casucci told Pranske that the vehicle's owner had brought it back, claiming that it was not fixed. Frankhouse worked on the vehicle when it was returned and reported to supervision he found that the rotors were warped, and they were cut under specifications. Thus, the dispute centered on whether Pranske should have replaced warped and under specification brake rotors. In addition, the CAR stated that Pranske had missed diagnosed a noisy drive shaft spline binding which was caused by dried grease. Pranske had worked on the vehicle 40 days prior to the warning and the vehicle had traveled 337 miles in the interim.

Casucci questioned Pranske as to whether he had measured the rotors. Pranske told him that he did not because he had been a technician long enough to know when rotors were too thin. Pranske also argued that because of the time and mileage that had elapsed since he worked on the vehicle any problems with the brakes or driveline could not be attributed to him. Casucci told Pranske that he was giving him a warning because he was taking a harder stand for customer satisfaction index purposes.

Pranske was upset about receiving the warning and walked out of Casucci's office after signing the warning. Pranske then

retrieved the rotors and measured them with his micrometer. He determined that the rotors were over spec. Pranske subsequently went to Casucci's office and told him that he had a problem with the writeup. He invited Casucci to check the rotors. Pranske measured the rotors in front of Casucci and they were over specification. Pranske also questioned whether they were warped. The men went to the brake lathe to see if the brakes were warped. Before the brakes were tested for warping, Casucci borrowed another technician's micrometer. Casucci measured the rotors and they were thicker than when they had been measured with Pranske's micrometer. Casucci was unsatisfied by this measurement and stated that the micrometer was not zeroed out. After the micrometer was adjusted, Casucci again measured the rotors and they measured even thicker.

Pranske then put one of the rotors on the lathe, where it showed that it was not warped. Pranske asked Casucci if he should test the second rotor, and Casucci said that it was not necessary. Casucci said he wanted to discuss the matter with Frankhouse as he was the employee who had reported the problem.

After lunch on Monday, January 27, Pranske met with Casucci, Service Manager Dave Pedersen, and Frankhouse. Casucci said that he had checked the rotors with Frankhouse's micrometer and one of the rotors was under spec. Casucci said that he had changed Pranske's warning to reflect that only one rotor was under spec. Pranske had Casucci bring technician Ted Gardner to the office to discuss the spline binding problems. Gardner had worked on the vehicle after Pranske and he told the men he did not recall hearing any noise, and that if he had, he would have examined the vehicle on a lift. Despite Gardner's recollection, Casucci did not remove the comments about the drive shaft binding from the warning. Casucci, however, did give Frankhouse a CAR for not having his micrometer properly calibrated.

B. Inspection and Insubordination Warnings

On January 29, Casucci summoned Pranske to the office to receive an additional CAR. Casucci told Pranske the warning was being issued because he had performed a safety check on a used vehicle and it was sold with leaks. Pranske explained that New Car Manager Steve Velasquez had told him to do a barebone inspection of the vehicle, and that Pranske had followed that direction. Pranske said that Velasquez, Assistant Used-Car Manager Francisco Novoa, and Company Car Buyer, Steve Candelaria had gone to Pranske and asked him how much it would cost to do a full inspection on a 1992 Saturn. Pranske explained that it would cost over $100 for an hour-and-a-half inspection, plus another half hour for a smog inspection. Velasquez told Pranske to go ahead but just to do the safety items. Pranske did the inspection as instructed and wrote up the job for 1-1/2 hours, plus the half hour for smog inspection. Pranske testified that had been asked to do quick safety inspections before, and he had recorded them in the same manner. Casucci was not satisfied with Pranske's explanation and said that there was not enough documentation concerning the car. Pranske went and got Novoa and Candelaria, they then met with Casucci. Novoa and Candelaria told Casucci that Pranske had done exactly what Velasquez had told him to do. Casucci said that he could not believe that. Pranske became angry at Casucci's response and told him the warning was a bunch of "b.s.," that Casucci should quit "screwing" with him, and that he was getting the warnings because of "union bullshit." Casucci told him that he was taking a harder stance and that type of behavior was not going to be tolerated. The men went into an office and at the conclusion of their discussion Pranske left the office and slammed the door. Casucci went to Pranske on the floor and told him to go home for the rest of the day.

On January 31, Casucci gave Pranske a second CAR for his "insubordinate" behavior in response to having received the warning concerning the safety check. The CAR notes Pranske's protesting the earlier warning by stating, "This isn't fucking right."

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd. 947 F.2d 953 (10th Cir. 1991). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Violations of Section 8(a)(4) of the Act are also analyzed using the *Wright Line* test. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

An Employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990). Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge then the employer has not shown that it would have disciplined the employee for a lawful, nondiscriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993); *T&J Container Systems,* 316 NLRB 771 (1995).

Pranske's union activities were known to the Respondent because his signed union authorization card was a matter of record in the hearing before Judge Parke. Additionally, he had given testimony in that earlier proceeding which was adverse to the Respondent. The timing of the warnings Pranske received were 2 months after Judge Parke's decision. The Respondent has employed Pranske as a used-car mechanic for 3 years and he had not received any warnings prior to the incidents described above. Finally, the element of union animus was established by the Respondent's unlawful conduct that Judge Parke

found violative of the Act and Respondent's actions found to violate the Act in this decision. I find, therefore, that the Government has established the necessary preliminary showing that the discipline given to Pranske was motivated by his union activities and his having given testimony against the Respondent.

The Respondent argues that Pranske was not discriminated against and merely received disciplinary warnings that resulted from his work-related problems. With regard to the first warning that centered on the disputed brake work the evidence shows that the matter arose when a fellow employee, Frankhouse, questioned Pranske's work. The warning given to Pranske was eventually modified to reflect Casucci's reassessment of the matter in light of new evidence called to his attention. Frankhouse also received a warning for his perceived misreporting of part of the problem. I find that the Government has not shown by a preponderance of the evidence that the January 24 warning given to Pranske was motivated by his union activities or because of his testimony. I conclude, with respect to that warning, that the Respondent has presented sufficient evidence that Pranske would have received that CAR regardless of his union or other protected concerted activity.[4]

The second and third warnings that Pranske received flowed from his being asked to perform an abbreviated inspection of a used car. I find that the Respondent has not satisfactorily explained Casucci's actions in rejecting the corroboration stated by Novoa and Candelaria that Pranske had done precisely what he had been instructed to do by higher authority. Based on demeanor and the record as a whole, I do not credit Casucci that he was merely disciplining Pranske for faulty work performance relating to the used-car inspection. Likewise, the third warning that resulted from Pranske's frustration about receiving the undeserved second warning was a continuation of what I find was discriminatory action taken against him because of his union activities and his testimony. I find that the Respondent has not proven it would have given these warnings to Pranske regardless of his protected activities. I conclude, therefore, that the Respondent did violate Section 8(a)(1), (3), and (4) of the Act by giving Pranske the January 27 and 31 warnings.

V. FRANKHOUSE

Charles Frankhouse had previously worked with Casucci at a California Toyota dealership. Both men were members of the Union while working at that dealership. Frankhouse subsequently met Casucci by chance in Las Vegas and Casucci solicited him to come to work for the Respondent. Frankhouse accepted and commenced work on August 12, 2002.

A. October 2002

Frankhouse started attending union meetings after he began work for the Respondent. Frankhouse also had a union sticker displayed on his toolbox at work. In approximately October 2002, some employees noticed the sticker and talked to him about union benefits. Frankhouse subsequently inquired of Casucci whether the Respondent had a pension plan for the service technicians. Frankhouse testified that Casucci told him that the Respondent did not have such a plan but did offer employees a 401(k) plan. Casucci asked Frankhouse why he wanted to know about the pension plan and Frankhouse told him that some employees had asked him about union benefits. Frankhouse testified that Casucci told him that it was not a good idea to talk about the Union and that the employees in the shop were not interested in the Union. Casucci said that if Frankhouse continued to speak to employees about the Union, he would be segregated from other employees.

Casucci testified that he recalled discussing benefits with Frankhouse who had asked him about a pension plan. Casucci recalled informing him of the 401(k) but did not recall them discussing anything about the Union.

Based on the demeanor of the witnesses while testifying about this incident, Casucci's admission that he did not "recall" any discussion about the Union and the persuasive recollection exhibited by Frankhouse, I credit Frankhouse's version of events.[5]

The test of whether an employer's remarks or actions violated 8(a)(1)'s prohibition against interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997); *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 490 (1995). Having credited Frankhouse, I find that the Casucci's remarks to him did tend to interfere with employee's Section 7 rights. I conclude, therefore, that the Respondent did violate Section 8(a)(1) of the Act by warning Frankhouse about discussing the Union and threatening that he would be segregated from other employees.

B. December 5, 2002

On December 5, 2002, Frankhouse received a written warning for having a sloppy work area and was told to clean it up daily. Frankhouse testified that he had never been told he was required to mop his service bay, and the only employees he

[4] I have found above that CARs were unlawfully implemented as part of the PIP program. I restrict that finding to the actual issuance of the CARs and distinguish the Respondent's right to discipline employees for nondiscriminatory reasons. The Respondent is normally privileged to correct or punish employees for poor work or similar problems that occur in the ordinary course of business. *Barnard College***,** 340 NLRB 934 (2003) ("[T]he fact that one party has violated the Act in a particular way does not give the other party carte blanche to engage in any conduct that he chooses."). Thus, to the extent that this decision finds the Respondent disciplined employees for nondiscriminatory reasons, I find those disciplines are not subject to remedial correction except for the expunging from the Respondent's records of all CARs issued to unit employees and not, in any way, using them as part of the Respondent's unlawful implementation of its PIP program.

[5] It is noted that while Frankhouse's testimony is credited in this instance, that is not the case regarding some of the rest of his testimony discussed in this decision. *NLRB v. Universal Camera Corp.***,** 179 F.2d 749 754 (2d Cir. 1950) ("Nothing is more common in all kinds of judicial decisions than to believe some and not all [of what a witness says".); *Champion Papers, Inc. v. NLRB*, 393 F.2d 388, 394 (6th Cir. 1968) ("A factfinder–jury, judge or administrative agency–is not barred from finding elements both of truth and untruth in a witness' testimony."); *NLRB v. Pat Izzi Trucking Co.,* 395 F.2d 241, 244 (1st Cir. 1968) ("That part of a witness' testimony is not believable does not of itself destroy the rest.").

observed mopping the bays were service porters (who are not part of the bargaining unit). Other employees testified that they had been told to keep their service bays clean. Frankhouse did not deny that his work area was in need of cleaning. I find that this warning was a routine work matter and was not shown to have anything to do with Frankhouse's union or protected concerted activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by disciplining Frankhouse for not keeping his work area clean.

C. January 28, 2003

On January 28, Casucci gave Frankhouse the previously discussed warning for not accurately measuring the brake rotor for which Pranske was also disciplined. I find that warning has not been shown to have had anything to do with Frankhouse's union or protected concerted activities, rather the evidence demonstrates that it was given as a routine matter for what was perceived by the Respondent to be poor workmanship. I conclude, therefore, that the Respondent did not violate Section 8(a)(1) and (3) of the Act by issuing this warning to Frankhouse.

D. February 25, 2003

The Government alleges that on February 25 the Respondent threatened Frankhouse with an unspecified reprisal because he made a request to have a fellow employee represent him at a disciplinary hearing. It is further alleged that Frankhouse was discriminatorily discharged on this date. The Respondent denies any threat occurred and Frankhouse's February 25 discharge was solely the result of his work misconduct.

The events surrounding the February 25 incident started with Frankhouse and Used-Car Manager Aaron Morey getting into an argument outside of the reconditioning office. Several witnesses testified about this situation, and the following are my findings of what the credible evidence shows occurred. Frankhouse was very loud and swearing during the argument. Casucci was in another part of the shop and heard the commotion. Casucci and Service Manager Dave Pedersen ran to the reconditioning office to investigate what was happening. After discussing the dispute with the men, Casucci invited Frankhouse into an office. Frankhouse asked to have a representative present with him and Pranske was summoned. Frankhouse was still very upset during the meeting. During the discussion in the office Pranske tried to persuade Cassuci to only give Frankhouse a suspension because of his conduct. Casucci, however, decided to discharge Frankhouse. Approximately a week later Frankhouse was reinstated following a review of the matter by Layla Holt, human resource manager for AutoNation.

Frankhouse testified that when he requested a representative be present on his behalf that Casucci told him that it was going to be harder on him if he had a witness in the meeting. Casucci testified that when Frankhouse made his request he said, "Charlie, come on. Let's go in the office. Let's just talk about it. We'll fix whatever it is." Frankhouse, insisted on having a witness and Casucci recalled saying, "Fine. No problem." Pranske was nearby during all of the events surrounding the argument and he testified that Frankhouse was using abusive language. Frankhouse asked Pranske to accompany him into the meeting. Casucci told Frankhouse that he really did not need Pranske. Frankhouse insisted, however, and Pranske recalled that Casucci said if it was all right with Pranske to serve in that capacity he could join them in the meeting. Pranske testified that at no point did he hear Casucci say anything to Frankhouse to the effect that it would be harder on him if he had a witness.

Pranske testified that in the subsequent meeting he tried to intervene on Frankhouse's behalf, by suggesting that Frankhouse only be suspended. Casucci and Pedersen said they needed 15 minutes to think it over. Casucci testified that Frankhouse continued to make "a big ruckus" as he left the office. Pranske's recollection was similar:

> And on the way out the door, Charlie was . . . still being abusive, and telling Vinnie and David that nothing is going to change. "Aaron's still not going to treat me fair.". . . . [H]e wouldn't stop being disruptive in the . . . meeting, when I was trying to get him out of the door so they could talk. And I finally . . . kind of like grabbed on to his shoulders, "come on Charlie, let's go." And we left the room.

Casucci testified that he was willing to consider Pranske's suggestion concerning a suspension in lieu of termination, but even as Pranske was guiding him out of the office, Frankhouse was "still ranting. . . . And you know, pretty much at that point, I just threw my hands up in the air. I can't help no more." Frankhouse and Pranske were subsequently recalled to the office and Casucci told Frankhouse that he was being terminated. Pranske testified that he told Frankhouse, "I'm sorry, I tried, but you wouldn't shut-up."

Considering the demeanor of the witnesses, I found Casucci and Pranske to have the more accurate recollection of what was said on February 25. I credit their testimony and find that the Government has failed to prove by a preponderance of the evidence that Casucci threatened Frankhouse for having requested a witness. I conclude, therefore, that the Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint regarding the February 25 incident.

Regarding Frankhouse's discharge, the Government has shown that Frankhouse was a known union supporter and that the Respondent (through its violations of the Act set forth in this decision) did demonstrate union animus. The timing of Frankhouse's February 25 discharge was contemporaneous with his union activities. I find, therefore, that the Government has established the necessary prerequisite to determining Frankhouse's termination under *Wright Line*. In considering the Respondent's defense to the discharge I find that it proved that Frankhouse was being loud and abusive in the shop to the extent that it was easily observable by shop employees and possibly the public. Casucci attempted to calm the situation and investigate the matter. Frankhouse remained loud and uncooperative and this ultimately resulted in his temporary termination. I find that the Respondent has met its burden of showing that it would have discharged Frankhouse on this occasion regardless of his union or other protected concerted activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it discharged Frankhouse on February 25, 2003. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

E. April 2, 2003

On April 2, Casucci and Pedersen held an employee meeting during which technicians were told that, for safety reasons, they should leave work by 6:30 or 7 p.m. Frankhouse retorted that he would leave work when he wanted to. Frankhouse received a written admonishment for insubordination as a result of his uncooperative attitude at the meeting. This warning is not alleged by the Government to have violated the Act.

F. April 17, 2003

The Government alleges that on April 17 the Respondent promulgated an overly broad and discriminatory no-solicitation rule by telling "employees" they:

> 1. Could not talk to any other service technicians, customers, and anyone else, including outside of work,
>
> 2. They had to inform their supervisor, Aaron Morey, that they were leaving their workstation; including leaving for lunch and the length of time they would be away from their workstation,
>
> 3. They had to secure permission from Aaron Morey to leave their workstation, and,
>
> 4. They were prohibited from going to other auto dealerships.

Additionally, the Government alleges that the Respondent unlawfully isolated and imposed onerous working conditions on Frankhouse. The Respondent denies that it unlawfully engaged in any of these acts.

On approximately April 17, Frankhouse was working on a Honda vehicle. He decided on his own that it would be helpful for him to drive the car to a local Honda dealer to perform diagnostic tests. Frankhouse did then take the car to the other dealership without telling Respondent's supervision what he was doing. While at the Honda shop he telephoned the owner to ask her about the car's problems. He then returned to the Respondent's dealership.

At some point before Frankhouse took the car to Honda, the vehicle's owner telephoned Service Manager Dave Pedersen to inquire about the progress of the repairs. Pedersen told her that he was watching Frankhouse work on the car at that moment. Casucci testified that Pedersen reported to him that approximately 20 minutes later the owner had called back and said that there was no way he had seen Frankhouse working on the car because Frankhouse had just telephoned her from the Honda dealership.

Casucci testified that Respondent's general manager, Bob Carmendy, had been contacted by the owner and he brought he complaint to him. Casucci recalled that Frankhouse's action had created a "very uncomfortable situation" because nothing was making sense to the customer and she was irritated and frustrated. Casucci testified that as a result of the incident he told Frankhouse he did not want him talking to customers. He also told him not to take cars to other dealers because, "I can't have somebody unauthorized bringing a vehicle to another facility, that I might be charged." Casucci also noted that Frankhouse had been "disappearing a lot." Casucci told Frankhouse that if he had a problem with a vehicle that he could not fix, he was to inform supervision who would get the car to the manufacturer dealer under controlled circumstances. Casucci recalled that a few minutes later Frankhouse came up to him and Pedersen and, in a scenario that reminded him of the "Twilight Zone," voiced to Pedersen that Casucci had just told him he could not talk to customers, people at work, friends, or technicians. Casucci questioned Frankhouse as to what he was talking about, and reiterated, "Just please, don't talk to Desert Toyota customers. That's it. I don't care what you do after work. Talk to your co-workers, but please do not talk to customers."

Frankhouse stated that normally the service writer would speak to customers, but he would do so "on occasion." He remembered that the vehicle's owner was upset when he told her that he was working on the car at the Honda dealership and she told him that somebody is "lying to me." Frankhouse testified that when he returned to the Respondent's shop Casucci was angry about him speaking to the customer and going to Honda with the car. Casucci told him that he was not to speak to anyone in or out of the dealership, and not to go anywhere without clearing it with Morey, and "he said he didn't want me going to any more dealerships." He recalled that a few days later, Casucci came to him and said he only had to tell Morey when he was going to test drive a car or go to lunch.

The respective demeanor of the witnesses leads me to credit Casucci as to what he told Frankhouse about restrictions on his activities and the reasoning behind those restrictions. I find that the Respondent's reaction to Frankhouse's unauthorized taking of the vehicle to another dealer, and the resulting customer distress this caused, was a legitimate business response to the situation that Frankhouse had created. The Government has not shown by a preponderance of the evidence that the restrictions given to Frankhouse were the result of his union or other protected concerted activity, and, therefore, I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act by imposing the restrictions upon him.

G. April 24, 2003

The Government alleges that on April 24 the Respondent gave Frankhouse an undeserved CAR. The Respondent argues that the personnel action was issued to Frankhouse only because of his careless work and record keeping.

Frankhouse was written up on April 24 regarding a vehicle that was returned for service after he had worked on it. The car had additional oil leaks that he apparently had not detected. He was notified that he should dedicate more time to quality control of his repairs, use a 5-mile test drive route to check on his engine repairs and be sure to record his in/out miles in the designated place on the Respondent's repair records. I find that the preponderance of the record evidence does not establish that this written warning was motivated by Frankhouse's union or protected concerted activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act by giving Frankhouse the April 24 warning.

H. Frankhouse's Termination

On May 7, Casucci called Frankhouse into the office to reprimand him about his poor work on a car that had been returned with continuing brake problems. Casucci also intended to chastise him for his continued disregard of instructions to record

mileage when he took a vehicle out of the shop. Also present at the meeting were Supervisor Pedersen and employee Pranske, who was present to represent Frankhouse. It is undisputed that Frankhouse became agitated as the men discussed the work problems and he eventually walked out in the middle of the meeting. Frankhouse then went to his toolbox, locked it, and left the premises. Pranske testified that he sarcastically commented on Frankhouse's behavior to the two supervisors by stating, "Well that went real well."

Approximately a day later, Frankhouse returned to the Respondent's dealership to pick up his paycheck. Casucci and Pedersen talked to him and Casucci told Frankhouse that he would telephone the next day to let him know what was going on with his employment situation. Pedersen asked Frankhouse for his phone number and Frankhouse replied that Pedersen could get it from the personnel department. Casucci testified that Pedersen said, "Come on Charlie; just give me the phone number." Frankhouse asked if Pedersen was "too lazy to go up there and get it." Casucci then intervened and told Frankhouse, "Charlie, please go. I'm going to go to personnel . . . to . . . get your telephone number. . . . [J]ust please leave." Finally Casucci testified that he discharged Frankhouse and told him, "Charlie, you know, we just can't have it anymore . . . I just can't stick up for you anymore."

Pedersen subsequently wrote in Frankhouse's personnel records that the termination resulted because:

> Differences are irreconcilable—Charles has made the decision to commit acts of insubordination too many times and has shown absolutely no remorse or effort to refrain from this behavior. For this reason we have decided to terminate his employment.

As noted above, I found that the Government met its burden of making a preliminary showing that is sufficient to analyze the Respondent's actions concerning Frankhouse under the *Wright Line* standards. With regard to his final termination in May, the Respondent has proven by the credible evidence that Frankhouse walked out of a disciplinary meeting and left the premises. Upon his return he uncooperatively would not give Pedersen his home phone number. The record demonstrates that this was the final event in a long series of confrontations and work problems that the Respondent attributed to Frankhouse. Despite numerous warnings and Casucci's efforts to tolerate Frankhouse's idiosyncrasies, matters had not worked out to the Respondent's satisfaction and Frankhouse was terminated. I find that the record as a whole demonstrates that the Respondent has proven that it would have discharged Frankhouse on this second occasion without consideration for his union or protected concerted activities. I conclude that the May 2003 discharge of Frankhouse did not violate Section 8(a)(1) and (3) of the Act.

VI. EMPLOYEE WORK OPPORTUNITIES

A. Decreasing the Work of the Unit as a Whole

The Government's complaint alleges that the Respondent hired new employees into the unit in an unlawful effort to diminish work opportunities for union supporters. From September 2002 to June 25, 2003, the Respondent hired 15 unit employees. During that same period, 13–14 unit employees left the Respondent's employ. The Government's posthearing brief concedes that, "[i]n light of this evidence produced at the hearing showing that both the unit and the available work remained fairly constant, there is little support for this allegation." I concur and find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by hiring employees for work within the collective-bargaining unit.

B. Reducing Flag Hours of Union Supporters

The Government alleges that from January 1 through May 31, 2003, the Respondent reduced the flag or flat rate hours earned by employees who had signed cards with the Union. "Thus, although it does not appear that the Respondent decreased the average work given to technicians, it decreased the amount of work assigned to Union supporters, thereby lowering their income." (GC Br. at 23.)

The Government points out that the Respondent had knowledge of which unit employees supported the Union because their union authorization cards were introduced into evidence in the hearing before Judge Parke. The Government argues that based upon this knowledge the Respondent set about retaliating against union supporters by decreasing the number of flag hours (flat rate hours) assigned to them. The Government bases this argument on a work hour comparison with other employees who did not sign union cards including Jim Stidham and Jim Breeden. The Government prepared a table of work hours of the months of January through May for the years 2002 and 2003 (GC Br. attachment A). The Government concludes that this flag hour comparison demonstrates unlawful discrimination in the work assignments. I cannot agree with that conclusion.

The table does show that some card signers did work noticeably fewer hours in 2003 (Bryant and Pranske); that employees Contreras, Halter, Nabizada, and Stidham only worked 2–3 of the months used for the 2003 comparison; and that union supporters Miller, Schwarz, and Wilson worked significantly more hours in the comparative 2003 period. The table also shows that Breeden, who apparently did not support the Union, worked significantly more flag hours in 2003. For the same 2003 period, however, Stidham worked fewer in 1 month, more in 2 months, and no longer worked for the Respondent in the remaining 2 months of the comparison period.

Since Pranske is included in this group and did work less flag hours in 2003, I have particularly scrutinized his situation in light of the finding that he was given unjustified warnings for his protected activities. Pranske's 2003 reduced flag hours were very similar in three of the months as those of Stidham whom the Government argues was unjustly rewarded because of his antiunion attitude. The same conclusion results when comparing Pranske with Gardner, who did not sign a union card. Thus, while Pranske's 2003 reduced hours are suspicious, it is much less so when his 2003 monthly hours are compared with these two nonunion supporters as well as the unit employees as a whole.

The Respondent argues that it did not discriminatorily change the work assignments of employees who supported the Union. The Respondent points out that the number of flag hours available for assignment varies greatly on a monthly basis.

Importantly, the total shop hours also dropped from 9000 in January 2002, to 7000 in May 2003. Casucci testified that he attributed this decrease to the opening of Centennial Toyota, a fourth Toyota dealership in the Las Vegas area. An analysis of the comparative total monthly flag hours (using the General Counsel's attachment A figures) shows that all the listed technician employees worked 17 percent fewer flag hours in the 2003 period.

MONTH	2002 FLAG HOURS	2003 FLAG HOURS
January	3181	3120
February	2913	2746
March	3525	2633
April	3314	2876
May	3568	2698
Total	**16501**	**14073**

In sum, the evidence shows that the comparative periods are relatively short, the records demonstrate a mixed picture of some union supporters working more hours in 2003 while some worked less, there was a decrease in total flag hours worked between the 2002 and 2003 periods, and there is no substantial evidence that the Respondent had motivation to assign less work to union supporters generally. I find the General Counsel has not met the weighty initial burden of showing that the Respondent discriminated against technician employees who supported the Union by decreasing their flag hour assignments in the designated 2003 period. I conclude the Respondent did not violate Section 8(a)(1) and (3) of the Act in its assignment of flag hours to its unit employees. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. T-West Sales & Service, Inc. d/b/a Desert Toyota, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO (formerly Local Lodge 744) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1), (3), (4), and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]